

**§ 776.84 Ethics investigation.**

(a) Whenever an ethics investigation is initiated, the covered attorney concerned will be so notified, in writing, by the Rules Counsel.

(b) The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

(1) To request a hearing before the investigating officer (IO);

(2) To inspect all evidence gathered;

(3) To present written or oral statements or materials for consideration;

(4) To call witnesses at his or her own expense (local military witnesses should be made available at no cost);

(5) To be assisted by counsel (see paragraph (c) of this section);

(6) To challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and

(7) To waive any or all of these rights.

(c) The covered attorney may be represented by counsel at the hearing. Such counsel may be:

(1) A civilian attorney retained at no expense to the Government; or,

(2) In the case of a covered USG attorney, another USG attorney:

(i) Detailed by the cognizant Naval Legal Service Office (NLSO), Law Center, or Legal Service Support Section (LSSS); or

(ii) Requested by the covered attorney concerned, if such counsel is attached to the cognizant NLSO, Law Center, LSSS, or to a Navy or Marine Corps activity located within 100 miles of the hearing site at the time of the scheduled hearing, and if such counsel is reasonably available, as determined by the requested counsel's reporting senior in his or her sole discretion. There is no right to detailed counsel if requested counsel is made available.

(d) If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Rules of evidence do not apply. The covered attorney concerned or his or her counsel may question witnesses that appear. The proceedings shall be recorded but

no transcript of the hearing need be made. Evidence gathered during, or subsequent to, the preliminary inquiry and such additional evidence as may be offered by the covered attorney shall be considered.

(e) The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

(f) The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall then recommend what further action is deemed appropriate.

(g) The IO shall forward the ethics investigation, including the IO's recommendations, to the Rules Counsel, as follows:

(1) In cases involving Navy or Marine Corps attorneys serving with NLSC units, via Vice Commander, NLSC;

(2) In cases involving Navy attorneys serving with Marine Corps units, via the Commandant of the Marine Corps (Attn: JA);

(3) In cases involving Navy or Marine Corps attorneys serving in subordinate Navy fleet or staff billets, via the fleet or staff judge advocate attached to the appropriate second-echelon commander;

(4) In cases involving members of the Navy-Marine Corps Trial Judiciary, via the Trial Judiciary Chief Judge;

(5) In cases involving Marine Corps attorneys serving in defense billets, via the Chief Defense Counsel of the Marine Corps;

(6) In cases involving Marine Corps attorneys not serving in defense counsel billets or in Navy units, via the OEGCMJ over the concerned attorney; and

(7) In cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other U.S. Armed Forces, via the appropriate military service attorney discipline section of that U.S. Armed Force.

(h) The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of this part or Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously provided copies of the complaint. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of this part or Code of Judicial Conduct has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously provided copies of the complaint that the file has been closed. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that professional disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to JAG.

#### § 776.85 Effect of separate proceeding.

(a) For purposes of this section, the term "separate proceeding" includes, but is not limited to, court-martial, non-judicial punishment, administrative board, or similar civilian or military proceeding.

(b) In cases in which a covered attorney is determined, at a separate proceeding determined by the Rules Counsel to afford procedural protection equal to that provided by a preliminary inquiry under this instruction, to have committed misconduct which forms the basis for ethics charges under this instruction, the Rules Counsel may dispense with the preliminary inquiry and proceed directly with an ethics investigation.

(c) In those cases in which a covered attorney is determined to have committed misconduct at a separate proceeding which the Rules Counsel determines has afforded procedural protection equal to that provided by an ethics investigation under this instruction, the previous determination regarding the underlying misconduct is *res judicata* with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the covered attorney a hearing into whether the underlying misconduct constitutes a violation of this part, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

(d) The Rules Counsel may dispense with the preliminary inquiry and ethics investigation, and if warranted, recommend to JAG that the covered attorney concerned be disciplined, consistent with this subpart, after providing the covered attorney concerned written notice and an opportunity to be heard in writing, in those cases in which a covered attorney has been:

(1) Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Judge Advocate General of another Military Department;

(2) Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals for the Armed Forces or by any Federal, State, or local bar; or